Supreme Court, U.S.
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No. 01 235 AUG 7 - 2001

IN THE

Supreme Court of the United States

ALBERTO CONCEPCION,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether this Court should resolve a split in the circuits and hold that where the quantity of narcotics charged in an offense under 21 *U.S.C.* § 841 triggers the applicability of an enhanced penalty, the narcotics quantity sufficient to invoke the enhanced penalty is an element of the offense that must be proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*, 813 F.2d 596 (3d Cir.) *cert. denied*, 484 U.S. 882 (1987).

(2) Whether the court below erred in finding that a plea to a narcotics conspiracy charge including a penalty enhanced on the basis of the quantity of the narcotics was knowing and voluntary where the district court failed to advise the defendant that the government would have to prove the element of a narcotics quantity sufficient to trigger the enhanced penalty to a jury beyond a reasonable doubt where that element is clearly a "material element" of the crime charged.

PARTIES BELOW

The parties to this case are those listed in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alberto Concepcion, respectfully prays that a writ of certiorari issue to permit review of the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

On May 10, 2001, the United States Court of Appeals for the Third Circuit filed a judgment affirming the Final Judgment of Conviction of the United States District Court for the District of New Jersey entered July 7, 2000. (App. 1a). A Memorandum Opinion of the Court was filed by the United States Court of Appeals for the Third Circuit on May 10, 2001. (App. 3a).

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered judgment on May 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution amend. VI.

United States Constitution amend. XIV.

21 *U.S.C.* § 841(a)(1).

STATEMENT OF THE CASE

On December 17, 2000, a federal Grand Jury sitting at Newark, New Jersey, returned a five count indictment against Concepcion and six other people, charging him with conspiracy to distribute 100 grams or more of heroin in violation of 21 *U.S.C.* §§ 841(a)(1), 846 (Count I), and with distribution and possession with the intent to distribute a quantity of heroin in violation of 21 *U.S.C.* § 841(a)(1) (Count IV).

Due to the charge of more than 100 grams of heroin, the statutory enhancement increased the penalty faced from 0-20 years (under 21 *U.S.C.* § 841(b)(1)(C) to 5-40 years (under 21 *U.S.C.* § 841(b)(1)(B)).

On or about March 15, 2000, Concepcion entered into a plea agreement with the government, pleading guilty to the first count of the indictment, conspiracy to distribute 100 grams or more of heroin in violation of 21 *U.S.C.* §§ 841(a)(1), 846.

Concepcion appeared before the Honorable Alfred J. Lechner, U.S.D.J., and entered a guilty plea to the first count of the indictment on or about March 16, 2000.

On or about May 31, 2000, Concepcion filed a motion to withdraw his plea, claiming innocence.

On or about July 7, 2000, the court, per Judge Lechner, denied Concepcion's motion to withdraw the plea-agreement and imposed sentence.

The court sentenced Concepcion to 325 months incarceration, far in excess of the 20 year (240 months) maximum that would have applied to the case had the district court not invoked the statutory enhancement in 21 *U.S.C.* § 841(a)(1)(B).

FACTS

On or about December 16, 1999, Concepcion was arrested. He was charged in two counts of a five count indictment alleging that: (1) he knowingly and intentionally conspired with Walter Roman, Julio Canales, Ana Negron, Jorge Retamar, and Wanda Santiago to possess and distribute 100 grams or more of heroin, in violation of 21 *U.S.C.* § 841(a)(1) (Count I); and (2) he knowingly and intentionally distributed and possessed with an intent to distribute a quantity of heroin, in violation of 21 *U.S.C.* § 841(a)(1) and 18 *U.S.C.* § 2 (Count IV). (App. at 5a).

On or about March 16, 2000, Concepcion entered a guilty plea to Count I of the indictment (conspiracy to distribute 100 grams or more of heroin) before the District Court, the Honorable Alfred J. Lechner, U.S.D.J., presiding. (Transcript of March 16, 2000 Proceedings, App. at 14a-15a).

The court advised Concepcion that the government would have to prove *two* elements to obtain a conviction, knowledge of the conspiracy and intent to join the conspiracy, but the court did *not* advise Concepcion that the government would have to prove that the conspiracy distributed at least 100 grams of heroin.

> Q. Those elements are set forth on page two—page three and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy.

(App. at 15a).

Concepcion then admitted that he conspired with the persons named in the indictment to sell heroin, which he acquired through various sources. The plea agreement included a stipulation that the quantity of narcotics at issue in the conspiracy was between 3 and 10 kilograms.

After entering the plea, Concepcion advised his attorney that he was innocent and never conspired to sell drugs with his alleged co-conspirators in the time period alleged in the indictment, May 1, 1998 through December 15, 1999.

Concepcion filed a motion to withdraw his plea, which was denied.

The District Court denied Concepcion's motion to withdraw his plea agreement.

The court then imposed sentence of 325 months. In so doing, the District Court imposed a penalty based on the enhancement provisions of 21 *U.S.C.* § 841(a)(1)(B) which includes a statutory minimum of 5 years and a maximum of 40 years, despite the fact that Concepcion

was not advised that the 100 gram quantity triggering the enhancement was an element of the offense, and that he had a right to put the government to its proofs on that element before a jury.

REASONS FOR GRANTING THE WRIT

I.

THERE IS CURRENTLY A SPLIT IN THE CIRCUITS ON THE QUESTION OF WHETHER THE NARCOTIC QUANTITY TRIGGERING AN ENHANCED PENALTY UNDER THE DISTRIBUTION AND CONSPIRACY TO DISTRIBUTE STATUTE IS A MATERIAL ELEMENT OF THE OFFENSE THAT NEEDS TO BE PLEADED AND PROVEN TO A JURY BEYOND A REASONABLE DOUBT.

Petitioner Concepcion was not advised by the District Court at the time that he pleaded guilty that in order for the enhanced penalties of 21 *U.S.C.* § 841(a)(1)(B) to apply to him should he go to trial the government would be required to prove that the conspiracy and/or distribution charge involved more than 100 grams of heroin. Concepcion concedes that the indictment in the case refers to the charge involving more than 100 grams, and he concedes that the plea agreement includes a stipulation to a quantity of between 3 and 10 kilograms[1]. Neither of those facts, however, controls. The fact that the charge itself referred to more than 100 grams did not

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[1] After the plea, Concepcion denied that he was guilty of any offense, and renounced the stipulation. His motion to withdraw his plea and to declare his innocence are not at issue in this petition.

inform Concepcion that he had a right to jury trial on that issue, and a right to put the government to its proofs on that issue. Similarly, any stipulation to a quantity greater than the 100 grams is likewise irrelevant to the case at hand. The question as to whether his plea was knowing and voluntary is not governed by any issues of actual innocence. Whether the conspiracy actually involved more than 100 grams of heroin is a different question than whether Concepcion made a fully informed decision in determining whether to plead guilty to the charge. A knowing, voluntary plea would have been one in which Concepcion could assess for himself whether the government could actually prove the existence of more than 100 grams in the conspiracy. Because Concepcion was not advised that the government would have to prove that more than 100 grams was involved in the conspiracy at the time that he went through the mental calculations to determine whether or not he should plead, he certainly did not have the ability to evaluate on an element by element basis whether the government could prove the case against him beyond a reasonable doubt. He was, in a word, misinformed by the District Court as to the elements of the charge against him.

The first step for the evaluation of whether Concepcion's plea was knowing and voluntary, then, is the determination of whether the drug quantity triggering the enhancement is in fact a material element of the crime charged. There is a split in the circuits on that topic, and for that reason petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

In *United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987), *cert. denied* 484 U.S. 882 (1987), the Third Circuit held that drug quantity triggering an enhancement was not an element of the offense. Five other circuits have held that it is an element of the offense. *U.S. v.*

Doggett, 230 F.3d 160 (2000), *cert. denied*, ___ S. Ct. ___, 2001 WL 38408 (2001); *United States v. Rebman*, 226 F.3d 521, 524 (6th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 931 (8th Cir.), *cert. denied*, 121 S.Ct. 600 (2000); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000); *United States v. Keeling*, 235 F.3d 533, 538 (10th Cir. 2000); *United States v. Rogers*, 228 F.3d 1318, 1356-27 (11th Cir. 2000).

The Sixth and Fourteenth Amendments to the Constitution entitle a criminal defendant to a jury determination that the defendant is guilty of each and every element of the crime charged, beyond a reasonable doubt. *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 2355 (2000). These rights are inviolable and have roots in our culture, history, and jurisprudence that predate our nation's founding. *Id.* at 2356.

In *Jones v. United States*, ___ U.S. ___ 119 S.Ct. 1215 (1999), this Court held that the Sixth and Fourteenth Amendments require that the Government allege and prove as elements of the charged offense provisions within a criminal statute that allow for enhanced penalties upon a specific showing, beyond a reasonable doubt. The statute at issue in *Jones* was a federal statute that provided a maximum 15-year term of imprisonment for an act of carjacking, but allowed for a maximum 25-year term if the carjacking resulted in serious bodily injury, or a term of imprisonment up to life if the carjacking resulted in death.[2] *Jones*, 119 S.Ct. at 1218.

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[2] The statute at issue in *Jones* provided, in pertinent part, that a person who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall—(1) be imprisoned not more than 15 years . . . , if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and if death results, be . . . imprisoned for any number of years up to life . . . ." 18 *U.S.C.* § 2119, *quoted in Jones*, 119 S.Ct. at 1216.

The government argued that the consideration of whether a carjacking resulted in serious bodily injury or death was a question to be determined at sentencing. In support of this argument, the government posited that the statute clearly separated the "elements" of the offense (violent, forceful, or intimidating conduct, taking a motor vehicle, connection with interstate commerce) from the "sentencing" provisions ("shall be . . . imprisoned not more than 15 years . . ."). *Id.* at 1218-19.

This Court rejected this argument. This Court noted that the language Congress employed in drafting the statute was not dispositive as to whether the conditions for exposing a defendant to higher penalties were "elements" or "sentencing factors." *Id.* at 1219. This Court, instead, examined the practical effect of the statutory provisions. This Court noted that the "penalty" section of the statute, in reality, allowed the imposition of "steeply higher penalties" that were absolutely conditioned upon a finding of further facts (bodily injury or death). *Ibid.* This Court also examined other federal statutes imposing greater penalties for causing bodily injury, and the history and purpose of the Sixth Amendment right to trial by jury. After this examination, this Court held that the statute should be construed as establishing three separate offenses by the specification of distinct elements, each to "be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for verdict." *Id.* at 1228. *See also Castillo v. United States*, ___ U.S. ___, 120 S.Ct. 2090 (1999) (holding clause in a statute that increased the maximum sentence of a person who uses a machinegun in relation to any crime of violence was subject to a mandatory 30-year prison term (as opposed to a 5-year term for a "firearm") set forth a separate element of the offense under the statute that must be charged, proven beyond a reasonable doubt, and submitted to a jury).

Concepcion argues *Jones* and *Castillo* would alone compel the result that drug quantity which triggers an enhanced penalty is an element of the offense. To the degree that this Court would have any doubt about the impact of *Jones* and *Castillo* on the issue at hand, however, this Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2358 (2000), conclusively resolves those doubts.

Apprendi involved a defendant's appeal from a sentence enhancement imposed by a state court that resulted in a sentence in excess of the maximum penalty prescribed by statute. Apprendi was arrested after firing a handgun into the home of an African-American family; he later confessed to the police that his conduct was motivated by an animus against African-Americans. *Id.* at 2351-52. He ultimately pleaded guilty to possession of a firearm and an antipersonnel bomb for an unlawful purpose in the second degree, which carries a ten-year maximum sentence. *Id.* at 2352. At sentencing, the court imposed a twelve-year sentence after finding by a preponderance of the evidence that the victims' race motivated Apprendi's conduct. *Id.*

The Supreme Court reversed the decision of the New Jersey Supreme Court to affirm the sentence. In so doing, the Court held that "other than the fact of a prior conviction, *any fact* that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[3] *Id.* at

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[3] The Court in *Apprendi* then incorporated into the holding Justice Stephens' concurring opinion in *Jones*, stating that " 'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' " *Apprendi*, 120 S. Ct. at 2363 (quoting *Jones*, 119 S.Ct. 1215 (Stephens, J., concurring)).

2362-63 (emphasis added). The Court predicated its decision on traditional Anglo-American common law principles that permit a judge to exercise discretion *within* the range prescribed by the legislature for imposing punishment but not *beyond* that range, as well as the Court's decisions that clearly adhered to those principles. *Id.* at 2356-62.

One Circuit early on discussed the issue that the quantity of drugs to be proven to establish a conspiracy under the statute should be an element of the offense that must be charged, proven by the Government beyond a reasonable doubt, and submitted to the jury. *United States v. Rigsby*, 943 F.2d 631 (6th Cir. 1991). In *Rigsby*, the defendant was charged with conspiracy to distribute marijuana in violation of 21 *U.S.C.* § 841(a)(1). He was convicted. At sentencing, the judge imposed sentence under subsection 841(b), after finding by a preponderance of the evidence that he had more than 1000 marijuana plants in his possession. *Id.* at 639-640. The defendant appealed the conviction, arguing, *inter alia*, that the sentencing court was obligated to submit the question of quantity to the jury and that the jury had to find him guilty, beyond a reasonable doubt. *Id.* The court agreed with the defendant's argument, and, in so doing, foreshadowed the Supreme Court's discussion in *Jones*. The Sixth Circuit commented that quantity is a substantial factual issue because a finding as to quantity determined a defendant's maximum sentence, which could range between 10 years and life, depending upon the drug and the quantity possessed. *Id.* The court did not reverse the defendant's conviction, however, because previous panels of that court, as well as other circuits, had held that the quantity of drugs was a factor to be considered at sentencing, not an element of the crime. *Id.* at 642-43. *See United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976) (holding that 21 *U.S.C.* § 845(a), because it provided

greater penalties for the distribution of drugs to a minor, required the government to prove to the jury, beyond a reasonable doubt, that the defendant sold drugs to a minor, and that whether drugs were sold to a minor is not merely a factor for the court to consider at sentencing).

The *Rigsby* court referred in its opinion to the dissent of Chief Judge Aldisert from the Third Circuit's decision in *Gibbs*, *supra*.[4] The Sixth Circuit commented that the dissent was persuasive in noting its disapproval of the previous holdings of its own panel, as well as other circuits, because Chief Judge Aldisert relied upon the importance drug quantity plays in determining a defendant's maximum statutory sentence. *Id.* at 641 n.5. Quoting from Chief Judge Aldisert's dissent, which now seems prescient in light of *Jones*, the Sixth Circuit stated "*Congress made the 1,000 pound marijuana quantity the fulcrum upon which turns the degree of opprobrium attached to the crime, and the concomitant degree of punishment available.* Given the importance of the quantity of marijuana involved, I would hold that it was intended to be an element of a greater inclusive offense under § 841(b)(6)." *Id.* (emphasis added).

Very recently, at least five circuits have held that the impact of the Court's broad language in *Apprendi* (*i.e.* "*any fact* that increases the penalty beyond the prescribed statutory maximum . . .") extends the holding in *Jones* to encompass § 841. In short, those circuits have held that *Apprendi* extends *Jones* to require the government to allege in an indictment and prove to a jury beyond a reasonable doubt the actual quantity of illegal drugs the defendant has manufactured or distributed,

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[4] In *Gibbs*, a panel of the Third Circuit held, in a 2-1 decision, that issue of the quantity of drugs in a conspiracy was an issue for the court to address at sentencing (upon proof by preponderance of the evidence), not an issue for the jury to decide (by proof beyond a reasonable doubt). *Gibbs*, 813 F.2d at 600.

thereby overruling the precedent in those circuits to the contrary. *See Doggett*, *Rebman*, *Aguayo-Delgado*, *Nordby*, *Keeling*, *Rogers*, *supra*.

For example, in *Doggett*, two defendants were indicted for conspiracy to manufacture an unspecified quantity of drugs in violation of 21 *U.S.C.* §§ 841(a), 846. *Doggett*, 230 F.3d at 162. A jury convicted the defendants. *Id.* At sentencing, the judge found by a preponderance of the evidence that the quantity of drugs was sufficient to incarcerate one defendant for 235 months and the other defendant for life. *Id.* The defendants objected to the imposition of enhanced penalties on grounds that *Jones* required the quantity of drugs to be proven to a jury beyond a reasonable doubt; this Court decided *Apprendi* during the pendency of the *Doggett* defendants' appeal. *Id.* at 162-63.

The Fifth Circuit acknowledged that although it could be argued that *Jones* did not clearly apply to require proving the quantity of illegal drugs as an element of the offense under § 841, *Apprendi* compelled this result. *Id.* at 163-64. The court noted that § 841(a) criminalized manufacturing or distributing illegal drugs and that § 841(b) defined specific penalties based on the type and quantity of drugs (among other factors). *Id.* at 164. The court then found that § 841(b) clearly predicates the severity of sentence upon proof concerning the quantity of drugs involved, from proof of no quantity ((b)(1)(C) (20 years)), to proof of 100 grams or more ((b)(1)(B) (40 years)) and to proof of 1 kilogram or more ((b)(1)(A) (life)). *Id.* The court commented that these increases were significant and held that "if the government seeks enhanced penalties based on the amount of drugs under 21 *U.S.C.* § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt." *Id.* at 164-

65. The Fifth Circuit then overruled its precedent decided prior to *Apprendi* that was inconsistent with the holding in *Doggett*. *Id.* at 165.

Applied here, *Apprendi* and the circuit court opinions it has engendered around the nation clearly compel the conclusion that the quantity of illegal drugs for which Concepcion agreed to plead guilty and on which his sentence was based constituted an element of the offense to be charged in his indictment and proven to a jury beyond a reasonable doubt. To the extent that *Gibbs* holds otherwise, this Court should overrule it and adopt the standard set forth in *Apprendi*.

Respectfully, petitioner urges that for the foregoing reasons, this Court should hold that the quantity of illegal substance is an element of the offense under 21 *U.S.C.* § 841 that must be charged in an indictment and proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*.

II.

CONCEPCION'S GUILTY PLEA WAS NOT KNOWLEDGEABLE AND VOLUNTARY BECAUSE HE WAS NOT ADVISED THAT THE NARCOTICS QUANTITY TRIGGERING AN ENHANCEMENT WAS AN ELEMENT OF THE OFFENSE AGAINST HIM, DESPITE THE REFERENCE TO THE QUANTITY IN THE INDICTMENT AND/OR ANY STIPULATION TO THE QUANTITY IN THE PLEA AGREEMENT.

A district court must ensure a defendant's plea is knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). This means advising the defendant

of the procedural constitutional rights being waived. *Id.* This also means engaging in colloquy with the defendant to ensure the defendant understands the nature of the "essential elements" of the charged offenses and the Government's obligation to prove them. *McCarthy v. United States*, 394 U.S. 459, 465-67 (1969); *F.R. Crim. P.* 11. *See United States v. Brown*, 117 F.3d 471, 476-77 (11th Cir. 1997). Although the court need not run through a ritualistic litany of the technical elements of the offense, the court is obliged to ensure that the defendant understands the nature of the "essential elements" of the offense under the totality of the circumstances. *See United States v. Cefaratti*, 221 F.3d 502, 508 (3d Cir. 2000).

For example, in *Brown*, the Eleventh Circuit vacated a guilty plea after the district court misinformed the defendant about the nature of the elements of the offense charged. The court accepting the defendant's guilty plea engaged in colloquy with the defendant advising him that his plea would waive his rights to remain silent, a jury trial, and cross examination. *Brown*, 117 F.3d at 473. The court then advised the defendant of the nature of the elements of the charge against him by actually reciting the elements. *Id.* After the defendant pleaded guilty and had been sentenced, the Supreme Court (in an unrelated case) held that the statute under which the defendant had pleaded guilty required that the Government prove an additional element, overruling previous Eleventh Circuit cases to the contrary. *Id.* The defendant filed a § 2255 petition on grounds that the plea and sentence should be vacated because he was not made aware of the element enunciated by the Supreme Court. *Id.* at 474. The Eleventh Circuit agreed, holding that the defendant's guilty plea could not have been knowing and voluntary because the elements the court discussed excluded an essential ele-

ment, thus misleading the defendant about the nature of the charges.[5] *Id.*

Brown is similar to the instant case and suggests that this Court should vacate Concepcion's plea and sentence. The District Court's explanation of the charges to Concepcion recited, incorrectly, that the elements of the government's case are "*two* in number": (1) knowledge of a conspiracy to distribute more than 100 grams of heroin; and (2) intent to participate in the conspiracy. (App. at 15a (emphasis added)). As in *Brown*, the District Court in its erroneous express recitation of the "elements" of the offense misled Concepcion, albeit unwittingly, given that *Apprendi* had not yet been decided. Because the District Court expressly referred to *two* elements and omitted proof of quantity as an element, and because *Apprendi* had not been decided, Concepcion and his attorney would have had no reason to know or understand that proof of quantity was a constitutionally required element of the Government's proofs on the charge to which he pleaded guilty. *See Nordby*, 225 F.3d 1059-60 (noting that it can be "no surprise" that defendant and counsel failed to object to *Apprendi* issue insofar as *Apprendi* and *Jones* had not been decided at the time of defendant's initial sentencing).

The government's argument that the sentencing court complied with Rule 11 by advising Concepcion of his right to remain silent, right to jury trial, and right to cross examine witnesses is unavailing. The inquiry here addresses whether Concepcion was aware of the nature of the "essential elements" of the offense to which he was pleading guilty, not the procedural safeguards his plea

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[5] The court also noted there was no retroactivity problem under *Teague v. Lane*, 489 U.S. 288 (1989), because the question involved interpreting a criminal statute, not the Constitution. *Brown*, 117 F.3d at 479.

would obviate. The two questions are different but are equally important in ascertaining whether a defendant's plea is knowing and voluntary. *Brown*, 117 F.3d at 476.

Second, the error was "plain," notwithstanding that *Apprendi* had not been decided at the time of Concepcion's plea hearing (March 2000). Where the settled law before the District Court is contrary to the law at the time of appeal, it is sufficient that the error be plain at the time of appeal. *See Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544, 1547 (1997).

Third, Concepcion's substantial rights have been affected when viewed in light of the prejudice to him. Had Concepcion known that the Government would have been required to prove he was knowingly and intentionally involved in a conspiracy to distribute a certain quantity of heroin (100 grams or more), he could have chosen to put the government to its proofs on that topic. *See United States v. Knobloch*, 131 F.3d 366 (3d Cir. 1997).

To counter the argument that Concepcion's substantial rights have been affected, the government argued below that advice concerning the quantity of heroin being an element of the offense against him was rendered unnecessary because he stipulated to a quantity of drugs that placed him within the parameters set by § 841(b)(1)(B), in excess of 100 grams. In so doing, the government relied on cases such as *United States v. Poulack*, 236 F.3d 932 (8th Cir. 2001), *United States v. Champion*, 234 F.3d 106 (2nd Cir. 2000), and *United States v. Walker*, 228 F.3d 1276 (11th Cir. 2000).

The fact that Concepcion admitted to conspiring to distribute a given amount is not dispositive of the amount he believed the government could have proven beyond a reasonable doubt. Had the sentencing judge advised Concepcion that at trial the government would have to prove he conspired to distribute more than 100

grams of heroin, Concepcion could have refused to accept the plea on his belief that his attorney could have raised a reasonable doubt at trial concerning the extent of Concepcion's involvement (if any) in any alleged conspiracy involving that quantity of drugs. Concepcion could have impeached the drug quantity aspect of the case. *See Nordby*, 225 F.3d at 1060 (showing of ability to raise a reasonable doubt as to drug quantity distributed attributable to defendant's conduct, where the issue of quantity was not submitted to a jury, affects the defendant's substantial rights).

There can be little doubt, moreover, that Concepcion's substantial rights have been affected by the District Court's plain error, when viewed in light of the error's consequences. Concepcion was charged with having violated 21 *U.S.C.* §§ 841(a)(1), 846, and he pleaded guilty to that charge. He was sentenced under § 841(b)(1)(B), which imposes a sentence from 5 to a maximum of 40 years, which is a significant enhancement from the 20-year maximum allowed under § 841(b)(1)(C). The sentence actually imposed on Concepcion, more than 27 years, exceeds the maximum penalty allowed by § 841(b)(1)(C) by more than seven years. *See United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000) ("[A] longer sentence undoubtedly affects substantial rights.").

Finally, where a defendant pleads guilty and is sentenced beyond the maximum statutory range without being advised that the Government would have to prove beyond a reasonable doubt the very element of the offense that extended the sentence beyond the maximum, the fairness and integrity of the system sustain irreparable injury. *Nordby*, 225 F.3d at 1061 ("The rights to jury trial and a determination of guilt beyond a reasonable doubt are the bedrock of our constitutional system of

justice . . . [and] fairness is undermined when a court's error 'impose[s] a longer sentence than might have been imposed had the court not plainly erred.' ")

Accordingly, for all the foregoing reasons, this Court should vacate Concepcion's plea of guilty.

CONCLUSION

Therefore, for all the foregoing reasons this Court should hold that: (1) the quantity of drugs manufactured or distributed is an element of the offense under 21 *U.S.C.* § 841 that must be charged in the indictment and proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*; and (2) the District Court committed plain error in failing to advise Concepcion at his plea hearing that the Government would have to prove to a jury beyond a reasonable doubt that he conspired to distribute 100 grams or more of heroin as an element of the offense charged against him.

Respectfully submitted,

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